unless such intention is very clearly expressed.[17] This narrow canon of construction seems unfortunate. Each nation entering a treaty owes not only good faith in adhering to the spirit of its engagements, but *uberrima fides*;[18] and if a treaty admits of two constructions, one restricted and the other liberal, the latter should be preferred.[19] Treaties are contracts between nations, and since their words are often translations from foreign phraseology, they should not be construed in a narrow special sense imposed upon them by local law unless such restricted sense is clearly intended.[20] In the recent case of *In re D'Adamo's Estate* (1914) 212 N. Y. 214, the court construed a treaty providing that in case a citizen of Sweden die intestate in this country, the Swedish consul "shall, so far as the laws of each country will permit, * * * have the right to be appointed administrator of such estate."[21] The court, applying the narrower rule of construction, refused to grant letters of administration to a consul claiming them under this clause. The decision rests on the phrase, "so far as the laws of each country will permit", which is interpreted to mean that State laws are not to be affected. Such interpretation nullifies the treaty and leaves the consul in precisely the same position as he was before, for he always had the right to administer estates so far as the laws of the States would permit. The effect of this decision is to change the phrase, "so far as the laws *will* permit", to "so far as the laws *now* permit." It is submitted, that under the proper rule of construction, this phrase refers to the laws as they *will* be after the treaty has become the supreme law of the land, and has consequently displaced the conflicting State law which is here enforced.

RIGHTS OF THIRD PARTIES ON CONTRACTORS' BONDS.—In most of our States, the English common law doctrine that where one person makes a promise to another for the benefit of a third the latter may not enforce the promise,[1] has never been accepted to its full extent. A great number of courts hold that a third party who has sustained damage from the breach of such a contract, or who would have benefited by the performance thereof, may, under certain circumstances, recover upon it against the defaulting promisor.[2] There is considerable conflict in these jurisdictions as to just what should be the precise rule determining these exceptions to the English doctrine, but, according to the preponderance of judicial authority, it seems that three things

[17]Estate of Ghio (1910) 157 Cal. 552; Austro-Hungarian Consul *v.* Westphal (1912) 120 Minn. 122; see Lanfear *v.* Ritchie (1854) 9 La. Ann. 96; *In re* Logiorato's Estate (N. Y. Sur. Ct. 1901) 34 Misc. 31. Even the Supreme Court has applied this rule. See Rocca *v.* Thompson (1912) 223 U. S. 317. A persuasive argument for a broader view of this question, is made in an article by Frederic R. Coudert in 13 Columbia Law Rev. 181.

[18]See Tucker *v.* Alexandroff (1901) 183 U. S. 424, 437.

[19]Hauenstein *v.* Lynham, *supra*, p. 487; Geofroy *v.* Riggs, *supra*, p. 271; *In re* Wyman (1906) 191 Mass. 276; Carpigiani *v.* Hall (1911) 172 Ala. 287.

[20]*In re* Lobrasciano's Estate (N. Y. Sur. Ct. 1902) 38 Misc. 415.

[21]37 U. S. Stat. at L. 1487, art. 14, par. 2.

[1]Price *v.* Easton (1833) 4 B. & Ad. 433.

[2]3 Page, Contracts, § 1307.

are essential to allow a beneficiary to maintain his action: first, the contract must be made upon a valid consideration; second, it must be directly intended to benefit the third person, and not merely be incidentally beneficial to him; third, the beneficiary must be a party to the consideration, or the promisee must owe him some legal or equitable obligation.[3] This exception-generated rule is now well established in a majority of the States, although several jurisdictions still adhere to the view of the English decisions, denying under all circumstances the right of a beneficiary to sue on a contract made for his benefit.[4] But so many practical difficulties have been experienced in the application of this majority rule, that even those courts which recognize it are not usually inclined to extend the doctrine to new or doubtful cases, but strive rather to confine it to its original limits.[5]

A multitude of actions, however, have arisen upon beneficiary contracts, and among them, the cases in which a sub-contractor, laborer or materialman has sought to recover against the sureties on a contractor's bond upon the ground that the obligation was entered into for his benefit, form a numerous and important class. In all cases of this sort, the courts refer to and apply, in one form or another, the general principles of the majority rule above set forth; but their decisions as to its interpretation and application with respect to particular sets of facts are hopelessly discordant and frequently irreconcilable. One of the chief conflicts arises upon the question as to when an agreement between the contractor and the owner of the premises, municipality, or other promisee, may be said to have been entered into with the intent to benefit sub-contractors, laborers, and materialmen, who may subsequently be engaged to assist in the performance of the contract. The most generally accepted rule seems to be that where the bond is conditioned upon the payment of all claims for labor and materials used in the process of construction, the parties furnishing such labor and materials may maintain an action against the sureties for the default of the contractor.[6] The right of such persons to sue on the bond is, of course, obvious, where the obligation is expressly declared to be for their use;[7] but the right is not always dependent upon such express provision, since a mere promise to pay for all labor

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[3] 3 Page, Contracts, §§ 1308-1316; See Vrooman *v.* Turner (1877) 69 N. Y. 280.

[4] Morgan *v.* Randolph & Clowes Co. (1900) 73 Conn. 396; Marston *v.* Bigelow (1889) 150 Mass. 45.

[5] See Durnherr *v.* Rau (1892) 135 N. Y. 219.

[6] Hipwell *v.* National Surety Co. (1906) 130 Ia. 656; National Surety Co. *v.* Foster Lumber Co. (1908) 42 Ind. App. 671. Such persons cannot sue, however, where the bond merely stipulates that the contractor shall perform his contract with the owner, Jones Lumber Co. *v.* Villegas (1894) 8 Tex. Civ. App. 669; Greenfield Lumber etc. Co. *v.* Parker (1902) 159 Ind. 571; but see Lichtentag *v.* Feitel (1905) 113 La. 931, or protect him against claims and liens. Hurd *v.* Johnson Park Investment Co. (N. Y. 1895) 13 Misc. 643; Dunlap *v.* Eden (1896) 15 Ind. App. 575; but see Smith *v.* Bowman (1907) 32 Utah 33.

[7] Getchell etc. Co. *v.* Peterson & Sampson (1904) 124 Ia. 599; American Surety Co. *v.* Raeder (1897) 15 Ohio Cir. Ct. 47, affd. 61 Ohio St. 651; Union Sheet Metal Works *v.* Dodge (1900) 129 Cal. 390. Some courts, especially those in the code States, base their decisions upon the rule that every action must be brought by "the real party in interest." Gastonia *v.* Engineering Co. (1902) 131 N. C. 363.

and materials has been held to sufficiently designate the class of persons for whose benefit this condition was inserted, to entitle them to bring suit upon the bond.[8] In the recent case of *Cleveland Metal Roofing & Ceiling Co.* v. *Gaspard* (Ohio 1914) 106 N. E. 9, it was held, three judges dissenting, that a bond conditioned upon such a promise was intended solely for the protection of the owner, and that a sub-contractor could not sue thereon in the absence of an express statement that it should inure to the use of third parties; but this view, though supported in some other jurisdictions,[9] is not in accord with the weight of modern authority. Those courts which, as in the principal case, refuse to allow third parties to recover on a contractor's bond, usually base their decisions upon the ground that the liability of a surety is to be strictly construed, and may not be extended by implication to conditions not clearly within the terms of the undertaking.[10] But this ancient doctrine should not prevent a construction of the bond and contract with a view to determining their fair scope and meaning,[11] especially as such agreements are promotive of a just protection of the industrial classes.[12]

Another point which has given rise to many inharmonious decisions, is the question of the necessity of a consideration moving from the beneficiary, or, at least, of some sort of privity between him and one of the parties to the contract. Where the premises are privately owned, and a mechanic's lien can attach, such lien is regarded as creating sufficient privity between the owner and the third party, and the latter is permitted to sue directly on the bond so as to avoid circuity of action.[13] But where no lien can attach, and where the third party is not privy to the consideration, and no legal or equitable obligation is owing to him on the part of the promisee, it has been held that he may not sue upon the bond.[14] At least one court, however, has gone to the extent of maintaining that the moral obligation of a city to protect those who work upon public constructions and improvements, creates sufficient privity between the city and the laborer, to allow the latter to sue on a bond entered into for his benefit by the city and the contractor.[15] Inasmuch as builders' and mechanics' liens cannot, in the absence of statute, attach to public works or buildings,[16] and as laborers and materialmen would thus be left completely unprotected as against defaulting contractors, the practical justice of this view cannot be questioned. But a more satisfactory method of attaining the same

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[8]American Surety Co. *v.* Thorn, etc. Co. (1899) 9 Kan. App. 8. It is not necessary, moreover, to show that the plaintiffs relied upon the bond, when furnishing the labor and materials; they must be presumed to have done so, at least, until the contrary is shown. Baker & Co. *v.* Bryan (1884) 64 Ia. 561.

[9]Eureka Stone Co. *v.* First Christian Church (1908) 86 Ark. 212.

[10]See Searles *v.* City of Flora (1906) 225 Ill. 167.

[11]See United States *v.* American Surety Co. (1906) 200 U. S. 197.

[12]See United States Gypsum Co. *v.* Gleason (1908) 135 Wis. 539.

[13]Ochs *v.* M. J. Carnahan Co. (1906) 42 Ind. App. 157.

[14]Jefferson *v.* Asch (1893) 53 Minn. 446; Brower Lumber Co. *v.* Miller (1896) 28 Ore. 565.

[15]City of St. Louis *v.* Von Phul (1896) 133 Mo. 561, overruling Kansas City Sewer Pipe Co. *v.* Thompson (1893) 120 Mo. 218; City of St. Louis *v.* Hill-O'Meara Construction Co. (1913) 175 Mo. App. 555.

[16]See Knapp *v.* Swaney (1885) 56 Mich. 345.

result has been adopted in many jurisdictions, where, by legislative enactment, a right of action has been expressly created in favor of laborers and materialmen upon the bonds of contractors engaged in the construction of public works—thus suspending the rule as to the necessity of privity between the promisee and the third party.[17] The intent of the legislature to interfere with the common law must be plain;[18] but once this has been established, such statutes should be liberally construed.[19]

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.—The doctrine that an equitable mortgage on land is created by the mere deposit of title deeds as security, arose in England late in the eighteenth century, and has there survived in the face of much hostile criticism and narrow limitation.[1] The severity of the common law mortgage had already led to interference by Chancery to enable the mortgagor to recover his lands by means of the equity of redemption even after the law day.[2] Gradually the jurisdiction of Chancery had been extended until it was the rule that any written instrument, too incomplete or informal to be enforced as a mortgage at law, would be held in equity to impose a lien upon the land, provided the agreement of the parties to pledge such land as security was clearly shown in the instrument.[3] Except for the Statute of Frauds, it seems, therefore, to have been but a single step in advance for Chancery to enforce such a lien where the agreement was evidenced only by the deposit as security of the title deeds to the land, for "* * * although there was no special agreement to assign, the deposit affords a presumption that such was the intent."[4] Nor does it seem unreasonable to infer such intent from the deposit in England, where titles are generally not recorded and the ability of a landowner to make a good title for his successor depends largely upon the possession of an unbroken chain of title deeds.[5] In this country, however, the delivery of deeds does not figure so prominently when real estate is transferred, and although a few State courts have openly adopted the English doctrine, the majority have refused to recognize it.[6]

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[17]See United States *v.* Jack (1900) 124 Mich. 210; Conn *v.* State (1890) 125 Ind. 514; Mullin *v.* United States (C. C. A. 1901) 109 Fed. 817.

[18]See Lyth *v.* Hingston (N. Y. 1897) 14 App. Div. 11. For a case where the intent to interfere was clearly shown, see Wilson *v.* Whitmore (N. Y. 1895) 92 Hun 466, affd. (1898) 157 N. Y. 693; and for a case where the intent was not clear, see Buffalo Cement Co. *v.* McNaughton (N. Y. 1895) 90 Hun 74, affd. (1898) 156 N. Y. 702.

[19]United States *v.* American Surety Co., *supra.*

[1]See note to Russel *v.* Russel (Lords Commissioners 1783) 18 Eng. Rul. Cas. 26-28.

[2]2 Story, Eq. Jur. (13th ed.) §§ 1004-1015.

[3]Hargrave & Butler's Notes on 3 Co. Lit., note 96.

[4]Reporter's note to Russel *v.* Russel (1783) 1 Brown's Chan. Cas. (2nd ed.) 269.

[5]1 Jones, Mortgages (6th ed.) § 179.

[6]The English doctrine is repudiated in the following cases: Probasco *v.* Johnson (Cincinnati Sup. Ct. 1858) 2 Disn. 96; Meador *v.* Meador (Tenn. 1871) 3 Heisk. 562; Shitz *v.* Dieffenbach (1846) 3 Pa. 233; Gothard *v.* Flynn (1852) 25 Miss. 58; Parker *v.* Carolina Savings Bank (1898) 53 S. C. 583; see Vanmeter *v.* McFaddin (Ky. 1848) 8 B. Monroe 435-437; Bloomfield Bank *v.* Miller (1898) 55 Neb. 243. The other view is taken in the following